(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: DEC 3 0 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal. The matter is now before the AAO on motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts, or business. The petitioner seeks employment as an early childhood multicultural education administrator. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner had not established that she qualifies for the classification sought, and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO upheld the director's findings on appeal.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

EXCEPTIONAL ABILITY

With regard to the issue of whether the petitioner qualifies as an alien of exceptional ability in the sciences, arts, or business, the AAO's July 18, 2013 decision dismissing the appeal stated:

> In denying the petition on April 1, 2013, the director stated: "The evidence does not show that the beneficiary qualifies for the requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability."

> The petitioner, on appeal, does not contest or even acknowledge this finding. Rather, counsel's appellate brief deals exclusively with the other stated ground for denial, concerning the national interest waiver. When an appellant fails to offer argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2. (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998). *See also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff abandoned his claims as he failed to raise them on appeal to the AAO). Therefore, the petitioner has effectively abandoned her claim of exceptional ability.
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> With no finding that she qualifies for the underlying immigrant classification, the petitioner cannot qualify for the national interest waiver.

On motion, counsel states: "Petitioner did not abandon her claim of exceptional ability. On page one of the appeal brief, paragraph 2, petitioner restated her qualifications as an alien of exceptional ability, as listed in 8 C.F.R. § 204.5(k)(3)(ii) . . . ."

The paragraph in the appeal brief identified by counsel stated:

> [The petitioner] requested an NIW [national interest waiver] based on her exceptional background and experience as an Early Childhood Educator who has been active in bi-cultural early child care and education both in her native Colombia, and in the United States for more than a quarter century, implementing and managing educational and community development projects, writing and publishing newspaper and magazine articles, giving talks and presentations at national child care conferences, and receiving media coverage for her ability to meet and respond to the particular needs and preferences of people of Hispanic background in the United States.

While counsel commented on the petitioner's "exceptional background" and activities in the field in the context of her national interest waiver claim, the preceding paragraph did not specifically challenge the director's finding that the petitioner had not qualified as "an alien of exceptional ability," or point to specific documentation submitted for at least three of the categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii) that supports a finding of eligibility. A passing reference without substantive arguments is insufficient to raise that ground on appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides that a petitioner seeking classification as an alien of exceptional ability must submit evidence that qualifies under at least three of the following categories of evidence:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

As the paragraph identified by counsel did not specify which of the above three categories of evidence that the petitioner claimed to meet, the petitioner has not overcome the AAO's determination that she abandoned her claim of exceptional ability. The petitioner has not established that the AAO's determination was based on an incorrect application of law or USCIS policy, or that it was incorrect based on a review of the arguments and documents presented on appeal.

NATIONAL INTEREST WAIVER

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

The AAO previously found that the petitioner's work is in an area of intrinsic merit and that the proposed benefits of her work would be national in scope. However, the AAO determined that the petitioner had failed to establish that she fulfilled the third eligibility factor set forth in *NYSDOT*.

In addressing reference letters submitted by the petitioner that contained "similar, and at times, identical" language, the AAO stated:

These similarities across the various letters suggest that the language in the letters is not the authors' own. *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge

> may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).
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> Because the letters appear to have been drafted by someone other than the purported authors, the letters possess little credibility or probative value. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).
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> USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* Based on the extensive similarities between the above letters, USCIS may accord them less weight.

In response to the above findings, counsel states:

> AAO questioned the probative value of some of petitioner's recommendation letters because they contained similar language. As a courtesy, petitioner did provide draft sample letters to the professionals who supported her NIW petition. Each writer was free to edit, add to, or delete any part of the sample letter, and each writer willingly signed the letter as indicative of his or her opinion of petitioner's exceptional abilities. An equally valid observation can be made that repetition of the same language serves to emphasize petitioner's exceptional abilities.

Counsel asserts above that "repetition of the same language serves to emphasize petitioner's exceptional abilities," but her argument is not supported by any pertinent precedent decisions to establish that the AAO's analysis of the reference letters was based on an incorrect application of law or USCIS policy. With regard to the identical language in the recommendation letters being accorded less evidentiary weight, the AAO's decision cited to multiple precedent decisions in support of its analysis of the letters. *See Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d at 145; *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d at 519; *Matter of Caron International*, 19 I&N Dec. at 795.

Counsel states that the "AAO itself used virtually identical language to that used in the USCIS denial in several sections of its decision." Counsel points to "page 6, paragraphs 6 and 7 of the USCIS denial" as being "indistinguishable" from language in the AAO's appellate decision, but there are no paragraphs 6 and 7 on page 6 of the director's decision denying the petition. Regardless, the similar language in the decisions of the director and the AAO pertains to the statute, legislative history, regulations, public rulemaking process, and precedent decision *NYSDOT*. There is no error in repeating the legal bases for a decision on an immigrant visa petition. In contrast, the identical language in the petitioner's recommendations letters was submitted as evidence from different witnesses who attested to her qualifications and eligibility for the classification sought.

In addition to the issue of identical wording appearing in multiple recommendation letters, the AAO stated:

> [T]he letters . . . did not show how the petitioner's work has had a significant effect outside of With respect to " being recognized as a model," the record does not establish that any other jurisdiction has actually adopted that model, or that such adoption has led to significant improvements in the problems that the petitioner's work seeks to address. . . . Accordingly, the content of the letters is insufficient to establish the petitioner's eligibility for the immigration benefit sought.

The arguments presented by counsel on motion do not specifically contest the AAO's above analysis regarding the content of the recommendation letters and their failure to demonstrate the petitioner's influence on the field as a whole. Furthermore, as previously stated, a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. Counsel's arguments are unsupported by any precedent decisions or other legal authority to overcome or undermine the AAO's reliance on *Cf. Surinder Singh v. Board of Immigration Appeals*, *Mei Chai Ye v. U.S. Dept. of Justice*, and *Matter of Caron International* in evaluating the recommendation letters. Accordingly, counsel has not presented sufficient grounds for reconsideration.

With regard to the petitioner's involvement with the , the AAO stated:

> Materials in the record show that the petitioner gave presentations at local or statewide conferences in and at the Annual Conference of the

* * *

> The petitioner's presentations at conferences outside of her own local area provides a means of disseminating her work, thereby lending it national scope (provided the petitioner intends to continue making such presentations, and provided national organizations continue to provide her that opportunity). Such dissemination, however, does not necessarily establish the impact and influence of the petitioner's work.

* * *

> Counsel states: "A further mark of [the petitioner's] national relevance is her active membership in the and her yearly educational presentations at conventions since 2006" (emphasis in original). Membership in a national organization does not lend national significance to any given member. With respect to her conference presentations, these are not "a further mark" of her impact, because counsel had already stated that the petitioner "has lectured in California,

> Maryland, New Mexico and Utah." The record shows that many of these lectures were the petitioner's presentations at [redacted] conventions. Citing the same evidence again, in a different context, does not constitute "further" support for the petition.

In response to the above findings, counsel states:

> AAO objected to petitioner's use of the same evidence to show membership in a national organization and national impact through lectures given for the same organization. Note that the USCIS Adjudicator's Field Manual, Chapter 22.2(a), states:
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> > A list of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii) (is) applicable to this immigrant classification. Note that in some cases, evidence relevant to one criterion may be relevant to other criteria set forth in these provisions.

The AAO, however, was not commenting on the petitioner's [redacted] membership and conference presentations as evidence of her eligibility for classification as an alien of exceptional ability pursuant to the regulatory categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii). Instead, the AAO was addressing the third prong of the *NYSDOT* test which requires the petitioner to establish that she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. The AAO indicated that the petitioner's [redacted] presentations had already been addressed earlier in the appellate decision, and that her membership in that organization was not sufficient to show any further impact or influence from her work. In order to establish eligibility for the national interest waiver, the petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *See NYSDOT*, 22 I&N Dec. at 219, n. 6.

Counsel further states:

> Few, if any multicultural early childhood educators have qualifications comparable to petitioner's – a college degree and certificates for additional post-college training in child care; experience far in excess of ten years; national, professional organization presentations; recognition by peers, former employers and government officials; media coverage; and intimate knowledge of Latina culture and language.
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> * * *
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> Petitioner's uncommon qualifications and the fact that in America only 4.9% of Latina women and 3.2% of Latina men obtain a bachelor's degree in any discipline, (National Center for Education Statistics. Table 297, Digest of Education Statistics 2010 (2011)), show that petitioner's degree of expertise is significantly above that ordinarily encountered in the field of early bi-lingual childhood education.

Counsel assets above that "few" multicultural early childhood educators have qualifications comparable to those of the petitioner. As the alien employment certification process was designed to

address the issue of worker shortages, a shortage of qualified workers in a given field does not establish eligibility for the national interest waiver. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221. Moreover, any objective qualifications which are necessary for the performance of the occupation can be articulated in an application for alien employment certification. *Id.* at 220-221. In addition, counsel asserts that the "petitioner's degree of expertise is significantly above that ordinarily encountered in the field of early bi-lingual childhood education." However, by statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given individual seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a national interest waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in her field of expertise.

The petitioner has not established that her past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *Id.* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole").

The petitioner has failed to support her motion with any legal argument, precedent decisions, or other comparable evidence to establish that the AAO's July 18, 2013 decision was based on an incorrect application of law or USCIS policy. In addition, the petitioner has not established that the AAO's previous decision was incorrect based on the evidence of record at the time of the decision. On the basis of the documentation submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reconsider is dismissed, the AAO's July 18, 2013 decision is affirmed, and the petition remains denied.